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No. OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

VALLEY BROADCASTING COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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12 pp

QUESTION PRESENTED

Section 1304 of Title 18 of the United States Code prohibits the broadcasting of advertisements for casino gambling and other activities that "offer[] prizes dependent in whole or in part upon lot or chance." 18 U.S.C. 1304. The court of appeals held in this case that statutory exceptions to Section 1304 render the statute unconstitutional under *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1995), which was decided while the appeal was pending. The question presented is whether the court of appeals erred in invalidating Section 1304 without allowing the government to present evidence bearing on the constitutionality of the statute under *Coors*.

PARTIES TO THE PROCEEDING

Petitioners are the United States of America and the Federal Communications Commission, defendants-appellants below. Respondents are Valley Broadcasting Company and Sierra Broadcasting Company, plaintiffs-appellees below.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America and the Federal Communications Commission, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 107 F.3d 1328. The opinion of the district court (App., *infra*, 23a-40a) is reported at 820 F. Supp. 519.

JURISDICTION

The judgment of the court of appeals was entered on February 25, 1997. A petition for rehearing was denied on August 25, 1997. App., *infra*, 21a-22a. On November 14, 1997, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including December 23, 1997. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 1304 of Title 18, United States Code, provides:

> Whoever broadcasts by means of any radio or television station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> Each day's broadcasting shall constitute a separate offense.

2. Section 1307(a) of Title 18, United States Code, provides:

> The provisions of sections 1301, 1302, 1303, and 1304 [of Title 18] shall not apply to —
>
> (1) an advertisement, list of prizes, or other information concerning a lottery conducted by a State acting under the authority of State law which is—
>
> (A) contained in a publication published in that State or in a State which conducts such a lottery; or

(B) broadcast by a radio or television station licensed to a location in that State or a State which conducts such a lottery; or

(2) an advertisement, list of prizes, or other information concerning a lottery, gift enterprise, or similar scheme, other than one described in paragraph (1), that is authorized or not otherwise prohibited by the State in which it is conducted and which is—

(A) conducted by a not-for-profit organization or a governmental organization; or

(B) conducted as a promotional activity by a commercial organization and is clearly occasional and ancillary to the primary business of that organization.

3. Section 2720 of Title 25, United States Code, provides:

Consistent with the requirements of [the Indian Gaming Regulatory Act (IGRA)], sections 1301, 1302, 1303 and 1304 of title 18, United States Code, shall not apply to any gaming conducted by an Indian tribe pursuant to [IGRA].

STATEMENT

1. a. Section 1304 of Title 18 of the United States Code prohibits television and radio stations licensed by the Federal Communications Commission (FCC) from broadcasting advertisements for "any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance." Section 1304 is part of a long-standing body of federal restrictions on interstate commerce involving gam-

bling activities. 18 U.S.C. 1084, 1301-1307; 39 U.S.C. 3001, 3005; see *United States* v. *Edge Broadcasting Co.*, 509 U.S. 418, 421-423 (1993). The prohibition now codified in Section 1304 was enacted in 1934 to supplement previously enacted restrictions on the distribution of lottery advertising and paraphernalia through the mails and other forms of interstate transportation. See 18 U.S.C. 1301 (interstate transportation), 1302 (mail); 39 U.S.C. 3001(a), 3005 (mail).

By its terms, Section 1304 applies to broadcast advertisements for any "lottery, gift enterprise, or similar scheme." In *FCC* v. *American Broadcasting Co.*, 347 U.S. 284 (1954), this Court construed that language to encompass any undertaking involving "(1) the distribution of prizes; (2) according to chance; (3) for a consideration." *Id.* at 290. That formulation encompasses the kinds of gambling activities that take place in casinos, and Section 1304 has therefore been understood to apply to casino gambling as well as to "lotteries" in the more traditional sense.

b. Since the enactment of Section 1304, Congress has added several exceptions to the statute. In 1976, Congress adopted a partial exception for lotteries conducted by a State, which allows the broadcasting of advertisements for state lotteries in States that conduct them but continues to prohibit advertisements in States that do not conduct lotteries. 18 U.S.C. 1307(a)(1). This Court sustained the constitutionality of the state lottery provision under the First Amendment in *Edge Broadcasting*, *supra*.

In 1988, Congress adopted additional exceptions for Indian gambling, charitable gambling, and government-conducted gambling other than state

lotteries. 18 U.S.C. 1307(a)(2)(A); 25 U.S.C. 2720.[1] In enacting those exceptions, Congress considered but specifically rejected proposals to allow broadcast advertising for casino gambling. See 134 Cong. Rec. 12,278-12,282 (1988) (House); *id.* at 31,073-31,076 (Senate).[2]

As discussed below, the decision of the court of appeals in this case attached particular significance to the statutory exception for Indian gambling. See App., *infra*, 15a, 19a. Like state governments, Indian tribes have come to rely on gambling as a source of public revenue. See 25 U.S.C. 2701(1); S. Rep. No. 446, 100th Cong., 2d Sess. 2-3 (1988). Congress "views tribal gaming as governmental gaming, the purpose of which is to raise tribal revenues for member services." *Id.* at 12. To accommodate the governmental interests of the nation's Indian tribes, while simultaneously responding to concerns about potential

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[1] Congress has also adopted exceptions for advertising of certain promotional activities that involve the distribution of prizes (*e.g.*, an auto dealership's car raffle) and fishing contests not conducted for profit. See 18 U.S.C. 1305, 1307(a)(2)(B).

[2] As originally proposed, the Charity Games Advertising Clarification Act of 1988, Pub. L. No. 100-625, 102 Stat. 3205 (codified principally at 18 U.S.C. 1307), would have removed advertising restrictions on all lotteries allowed under state law, including commercial casino gambling. See 134 Cong. Rec. 12,278-12,280 (1988). The House of Representatives, however, adopted an amendment that specifically excluded casino gambling from the bill, over the objections of representatives from Nevada and New Jersey. *Id.* at 12,280-12,282. The Senate subsequently redrafted the bill to accomplish the same result. *Id.* at 31,073-31,076. In its report on the bill, the Senate Judiciary Committee emphasized that "no provision of [the bill] is intended to change current law as it applies to interstate advertising of professional gambling activities." *Id.* at 31,075.

criminal infiltration and other problems, Congress enacted the Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. 2701 *et seq.*). See *Seminole Tribe* v. *Florida*, 116 S. Ct. 1114, 1119-1120 (1996).

As part of Congress's effort to "promot[e] tribal economic development," 25 U.S.C. 2702(1), IGRA exempts from Section 1304 "any gaming conducted by an Indian tribe pursuant to [IGRA]." 25 U.S.C. 2720. At the same time, the Act substantially tightens government oversight of Indian gambling, by subjecting certain types of gambling to direct federal regulation and subjecting other types of gambling to regulatory compacts between Indian tribes and States. 25 U.S.C. 2704-2706, 2710-2712. In addition, the Act mandates that the net revenues of Indian gambling be used solely for public purposes. 25 U.S.C. 2710(b)(2)(B), (d)(1)(A)(ii), and (d)(2)(A).

2. a. Respondents are Nevada television stations that wish to broadcast advertisements for Nevada casino gambling. They filed this suit against the United States and the FCC in 1992 to challenge the constitutionality of Section 1304.[3] Respondents claimed that, with respect to broadcast advertisements for legal casino gambling, Section 1304 violates the First Amendment under *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980). Under *Central Hudson*, the constitutionality of a government restriction on commercial speech turns on: (1) whether the provision restricts truthful speech about lawful commercial activities;

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[3] Respondents also challenged the constitutionality of an FCC regulation that incorporates the terms of Section 1304. See 47 C.F.R. 73.1211.

(2) whether "the asserted governmental interest [for the provision] is substantial"; (3) whether the provision "directly advances" the asserted interest; and (4) whether the provision is "more extensive than is necessary to serve that interest." *Id.* at 566.

The government defended the constitutionality of Section 1304 on the basis of two governmental interests: first, an interest in assisting States that restrict or prohibit gambling, and, second, an independent federal interest in minimizing the social costs traditionally associated with gambling activities. The government contended that Section 1304 directly advances both of those interests by reducing public demand for gambling and by shielding non-gambling States from gambling advertisements broadcast in adjacent States.

Respondents argued, *inter alia*, that the statutory exceptions to Section 1304 (see pp. 4-6, *supra*) preclude it from "directly advancing" the government's interests. In response, the government looked to this Court's decision in *Posadas de Puerto Rico Associates* v. *Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986). In *Posadas*, this Court held that a law prohibiting casino gambling advertising in Puerto Rico directly advanced the legislature's interests despite the fact that the legislature permitted other kinds of gambling to be advertised. The Court reasoned that, "whether other kinds of gambling are advertised in Puerto Rico or not, the restrictions on advertising of casino gambling 'directly advance' the legislature's interest in reducing demand for games of chance." *Id.* at 342. The Court sustained the constitutionality of the statute without requiring evidence of the actual scope or impact of advertising for other forms of gambling. See *id.* at 341-344.

The government contended in this case that the statutory exceptions to Section 1304 are without constitutional significance for the same reasons as the exceptions in *Posadas*: eliminating broadcast advertisements for casino gambling directly advances the government's interests, regardless of whether advertising for other kinds of gambling is permitted, and the government has a particular interest in reducing demand for casino gambling. In light of *Posadas*, the government did not present evidence regarding the actual operation and effect of the statutory exceptions to Section 1304.

b. In April 1993, the district court entered summary judgment in favor of respondents. The district court held that the government's only legitimate interest under Section 1304 was that of "protect[ing] state choice," an interest that the government itself had never relied on, and that Section 1304 was not adequately tailored to that supposed interest. App., *infra*, 34a-38a.

The government appealed the district court's decision to the Ninth Circuit in June 1993. Thereafter, the case remained pending on appeal for nearly four years.[4] During the time that the appeal was pending, this Court issued intervening decisions in a number of commercial speech cases. See *44 Liquormart, Inc.* v. *Rhode Island*, 116 S. Ct. 1495 (1996); *Florida Bar* v. *Went for It, Inc.*, 515 U.S. 618 (1995); *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1995); *Ibanez* v. *Florida Dep't of Business & Professional Regulation*, 512

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[4] The appeal was argued in February 1995. Shortly thereafter, one of the original members of the Ninth Circuit panel died and was replaced by another member of the court. See App., *infra*, 1a n.*.

U.S. 136 (1994); *Edge Broadcasting, supra*; *Edenfield* v. *Fane*, 507 U.S. 761 (1993).

For present purposes, the most significant of those intervening decisions is *Coors*. *Coors* addressed a First Amendment challenge to a federal statute prohibiting the disclosure of alcohol content information on beer labels. The government asserted that the labeling restriction furthered the public interest in preventing industry "strength wars." 514 U.S. at 483-484. The Court agreed that the interest in preventing strength wars was substantial, but held that the statute did not "directly advance" that interest as required by *Central Hudson*, because other provisions of the law "directly undermine and counteract its effects." *Id.* at 489. The Court pointed out that Congress had permitted brewers to disclose alcohol content information through direct promotional advertising in most of the country and that Congress had imposed no restrictions on alcohol content labeling for hard liquor and wine. *Id.* at 488-489. The Court concluded that those "exemptions and inconsistencies" precluded the labeling ban from achieving its goal. *Id.* at 489. Relying on *Edenfield, supra*, which was decided shortly after the district court decision in this case, the Court held that the government had failed to "carr[y] the burden of showing that the challenged regulation advances the Government's interest 'in a direct and material way.'" *Id.* at 487 (quoting *Edenfield*, 507 U.S. at 767).

c. In February 1997, the Ninth Circuit affirmed the judgment of the district court in this case. App., *infra*, 1a-20a. Unlike the district court, the court of appeals held that the government's interests in assisting non-gambling States and discouraging public participation in gambling activities are substan-

tial. *Id.* at 8a-12a. However, the court of appeals held that Section 1304 does not directly advance those interests and therefore fails the third step in the *Central Hudson* inquiry. *Id.* at 13a-20a. In light of that holding, the court found it unnecessary to reach the fourth step. *Id.* at 20a n.9.

The holding of the court of appeals regarding the direct advancement requirement of *Central Hudson* rested chiefly on this Court's intervening decision in *Coors*. In light of *Coors*, the court concluded that the statutory exceptions to Section 1304, particularly the exception for Indian gambling, prevent Section 1304 from "materially * * * discourag[ing] public participation in commercial lotteries." App., *infra*, 16a. The court also concluded that the Indian gambling exception "would appear to undermine the government's purported interest in protecting non-casino states from the reach of casino advertisements on the airwaves." *Id.* at 19a.

The court of appeals acknowledged that "[i]t may be that such advertising is limited in scope * * * and thus does *not* interfere with the government's interest in protecting [non-casino] states." App., *infra*, 19a (emphasis added). Rather than remanding for presentation of evidence on that issue, however, the court instead struck down the statute. The court reasoned that it need not explore further the actual effect of the statutory exceptions because "the government has failed to provide any evidence" on the issue. *Ibid.*

d. The government filed a petition for rehearing and suggestion of rehearing *en banc*. The government argued, *inter alia*, that the court of appeals should remand the case for evidentiary proceedings relating to the statutory exceptions to Section 1304.

The government explained that it had not presented evidence regarding the operation and scope of the statutory exceptions because precedents such as *Posadas* had made the presentation of such evidence unnecessary at the time of the district court proceedings. The government pointed out that the cases on which the court of appeals relied were not decided until after the completion of the district court proceedings—in the case of *Coors*, more than two years afterward. The court of appeals denied the government's petition without opinion. App., *infra*, 21a-22a.[5]

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[5] The constitutionality of Section 1304's prohibition against the advertising of lawful casino gambling is also at issue in two other cases currently in the federal courts. The Fifth Circuit is considering the constitutionality of the statute in *Greater New Orleans Broadcasting Ass'n* v. *United States*, No. 94-30732, which was previously remanded by this Court in light of *44 Liquormart, supra*. See 117 S. Ct. 39 (1996). The second pending case is *Players International, Inc.* v. *United States*, No. 96-4911 (D.N.J. Dec. 16, 1997). In *Players*, the government presented substantial evidence in support of the constitutionality of Section 1304. Nonetheless, on December 15, 1997, the district court issued an opinion holding the statute unconstitutional. The court found that the government's twin interests in assisting States that restrict or prohibit gambling and in minimizing the social costs traditionally associated with gambling are substantial, see slip op. 8-16, but the court concluded that Section 1304 cannot survive scrutiny under the third and fourth steps in the *Central Hudson* analysis, see slip op. 16-22. Therefore, on December 16, 1997, the district court issued an order granting summary judgment for the plaintiffs and declaring that Section 1304 unconstitutionally infringes on their First Amendment rights. The government is currently reviewing the district court's decision in order to determine whether to appeal.

REASONS FOR GRANTING THE PETITION

The decision of the Ninth Circuit in this case disregards basic principles of constitutional adjudication. The court of appeals invalidated an Act of Congress based on a record that was not adequate to resolve the constitutional issues decided by the court, given the court's interpretation of the governing precedents. Moreover, the constitutional precedents on which the court relied in invalidating the statute were not decided until after the completion of the district court proceedings in this case. The court of appeals nonetheless denied the government the opportunity to introduce evidence in response to those intervening precedents, which the court of appeals read as imposing a new evidentiary burden on the government.

Turner Broadcasting System, Inc. v. *FCC*, 512 U.S. 622 (1994) (*Turner I*), and similar decisions make clear that, when a court finds that the constitutionality of an Act of Congress turns on factual questions that are not adequately illuminated by the existing record, the court should not resolve the constitutionality of the statute, but should instead remand for development of a sufficient record. Because the court of appeals acted prematurely in deciding the constitutionality of 18 U.S.C. 1304, the government does not ask this Court to take up the underlying constitutional issue at this time. Instead, the Court should vacate the Ninth Circuit's decision and remand the case for further evidentiary proceedings before the district court. Those proceedings may enable the Ninth Circuit to uphold the statute and thus obviate

the need for this Court to address the constitutional question at issue in this case.[6]

1. When a court is presented with a challenge to the constitutionality of a federal statute, the constitutional issues before the court often are purely legal ones that can be resolved without reference to an extensive evidentiary record. In some instances, however, the legal standards governing particular constitutional claims make it necessary for the court to address factual issues relating to the scope or operation of the statute. For a variety of reasons, the court may find that the record before it does not cast sufficient light on the factual issues surrounding the constitutional claim. That problem is particularly likely to present itself on appeal, when the reviewing court may take a different view of the governing legal standards than the trial court took and is faced with a pre-existing record rather than one that is still being developed.

a. This Court's recent decision in *Turner I*, *supra*, illustrates the appropriate response of an appellate court when it finds the record is inadequate to resolve a constitutional challenge to a federal statute. In *Turner I*, this Court was presented with a First Amendment challenge to the "must-carry" provisions of the Cable Television Consumer Protection and

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[6] Of course, should the Court determine that the record has been developed sufficiently for the Court to decide the underlying constitutional issue in this case, the government is prepared to defend the constitutionality of Section 1304. As indicated *infra*, however, we believe the better course is to remand for additional fact-finding and further consideration of the issues on the basis of a more appropriate record by the district court, and, if necessary, the court of appeals and, perhaps ultimately this Court.

Competition Act of 1992. Borrowing from the Court's formulation of the "direct advancement" inquiry in *Edenfield* v. *Fane*, 507 U.S. 761 (1993), a plurality of the Court in *Turner I* held that the government had the burden of showing that "the recited harms [underlying the must-carry provisions] are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." 512 U.S. at 664 (opinion of Kennedy, J.) (citing *Edenfield*, 507 U.S. at 770-771). The plurality then examined the record and determined that it was not sufficient to satisfy the government's burden regarding the efficacy of the must-carry provisions. *Id.* at 665-668.

Having found the existing record inadequate to sustain the constitutionality of the must-carry provisions, the plurality did not invalidate the statute. Instead, "[b]ecause of the unresolved factual questions, the importance of the issues * * * , and the conflicting conclusions that the parties contend are to be drawn from [the existing record]," the Court deemed it "necessary to permit the parties to develop a more thorough factual record, and to allow the District Court to resolve any factual disputes remaining, *before* passing upon the constitutional validity of the challenged provisions." 512 U.S. at 668 (opinion of Kennedy, J.) (emphasis added); *id.* at 669-674 (Stevens, J., concurring in part and concurring in the judgment). The Court therefore remanded for further evidentiary proceedings. *Ibid.*

Following the completion of the proceedings on remand, the case was again appealed to this Court. On appeal, the Court held that the record presented on remand was sufficient to sustain the constitutionality of the must-carry provisions. *Turner Broadcasting*

System, Inc. v. *FCC*, 117 S. Ct. 1174, 1189-1203 (1997) (*Turner II*). The remand in *Turner I* thus led to the eventual vindication of a statute the constitutionality of which was not adequately demonstrated by the original record.

The Court took the same approach to an inadequate constitutional record in *Askew* v. *Hargrave*, 401 U.S. 476 (1971) (per curiam). In *Askew*, the Court vacated and remanded a three-judge district court decision holding that a Florida education tax statute violated the Equal Protection Clause. In addition to remanding for consideration of *Pullman* abstention,[7] see *id.* at 478, the Court directed the district court to reopen the record to permit Florida to introduce evidence bearing on the equal protection claim:

> [T]he pleadings and the [plaintiffs'] affidavit * * * are inadequate as a basis for deciding the equal protection claim. They do not sufficiently present the facts related to [Florida's] argument that the [challenged law] was only one aspect of a comprehensive legislative program for reorganizing educational financing throughout the State to more nearly equalize educational opportunities for all the school children of the State. * * * *Since the manner in which the program operates may be critical in the decision of the [constitutional] claim, that claim should not be decided without fully developing the factual record at a hearing.*

Id. at 478-479 (emphasis added).

The Court also followed the principle against adjudication of a constitutional issue based on an inade-

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[7] See *Railroad Comm'n* v. *Pullman Co.*, 312 U.S. 496 (1941).

quate record in *Storer* v. *Brown*, 415 U.S. 724 (1974). In *Storer*, a three-judge district court had upheld against a First and Fourteenth Amendment challenge a California statute imposing certain signature requirements on persons desiring to stand for election as independent candidates for President and Vice President. *Id.* at 727. In order to qualify for inclusion on the ballot as an independent, an aspiring candidate was required to file a petition signed by voters numbering no fewer than five percent of the total votes cast in California in the last general election. *Id.* at 727, 738. The signatures had to be gathered within a 24-day period between the primary and the general elections, and signatures from individuals who voted in the primary elections could not count toward the required number. *Id.* at 727, 739. The Court found it "necessary to know other critical facts which do not appear from the evidentiary record" before it could pass on the constitutionality of the statute. *Id.* at 738. The Court "was quite sure, therefore, that further proceedings should be had in the District Court to permit further findings with respect to the extent of the burden imposed on independent candidates for President and Vice President under California law." *Id.* at 740. The Court therefore remanded without passing on the constitutionality of the California law. *Id.* at 746.

b. In declining to resolve constitutional challenges to legislation until after the development of an adequate record, decisions such as *Turner I*, *Askew*, and *Storer* reflect more general principles of constitutional adjudication. This Court has repeatedly emphasized that federal courts are obligated to avoid passing prematurely on constitutional questions. See, *e.g.*, *Clinton* v. *Jones*, 117 S. Ct. 1636, 1642 n.11

(1997); *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 756 n.8 (1976); *Communist Party of the United States* v. *Subversive Activities Control Bd.*, 367 U.S. 1, 71-72 (1961); *United States* v. *Raines*, 362 U.S. 17, 21 (1960); *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 568-571 (1947); *Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 345-348 (1936) (Brandeis, J., concurring). Fidelity to that principle means, among other things, that, "before * * * questions of constitutional law, both novel and of far reaching importance, [are] passed upon by this Court, 'the facts essential to their decision should be definitely found by the lower courts upon adequate evidence.'" *Borden's Farm Prods. Co.* v. *Baldwin*, 293 U.S. 194, 212 (1934) (quoting *City of Hammond* v. *Schappi Bus Line, Inc.*, 275 U.S. 164, 171-172 (1927) (Brandeis, J.)); *Polk Co.* v. *Glover*, 305 U.S. 5, 10 (1938) (citing "[t]he salutary principle that the essential facts should be determined before passing upon grave constitutional questions"). See also *H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 574-575 (1949) (Frankfurter, J., dissenting) (giving examples of cases "remanded [by the Court] to avoid constitutional adjudication without adequate knowledge of the relevant facts").[8]

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[8] The principle that appellate courts should not decide constitutional questions until trial courts have adequately developed the facts required for a decision parallels the principle under which this Court has declined to decide constitutional issues until state courts have clarified relevant provisions of state law. See, *e.g.*, *Rescue Army*, 331 U.S. at 575-585 (declining to exercise jurisdiction over appeal of denial of writ of prohibition in order to permit development of the facts and interpretation of state law in a state court trial); *Alabama State Fed. of Labor* v. *McAdory*, 325 U.S. 450, 461 (1945); *Spector Motor Serv.* v. *McLaughlin*, 323 U.S. 101, 105 (1944).

The duty to avoid premature resolution of constitutional questions is particularly acute when the constitutionality of a federal statute is called into question. "Judging the constitutionality of an Act of Congress is properly considered the 'gravest and most delicate duty that this Court is called upon to perform.'" *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985) (quoting *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.)). See also *Raines*, 362 U.S. at 20.[9] While the invalidation of a federal law "is a formidable means of vindicating individual rights, when employed unwisely or unnecessarily it is also the ultimate threat to the continued effectiveness of the federal courts in performing that role." *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982). When a court passes on the constitutionality of a federal law without a record that adequately illuminates the constitutional issues before the court, it risks invalidating a statute that a more sufficient record would show to be within the constitutional authority of the political branches. In so doing, the court thereby exceeds the proper bounds of "the role assigned to the

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[9] As one eminent scholar of constitutional law has stated, "[i]t must be evident to anyone that the power to declare a legislative enactment void is one which the judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility." 1 Thomas M. Cooley, *Constitutional Limitations* 332 (8th ed. 1927).

judiciary in a tripartite allocation of power." *Id.* at 474 (quoting *Flast* v. *Cohen*, 392 U.S. 83, 95 (1968)).[10]

c. Resolving a constitutional challenge on the basis of an inadequate record is particularly inappropriate when the constitutional standards that govern the case have changed after the completion of the evidentiary proceedings. It is a fundamental principle that litigants "[should] not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." *Hormel* v. *Helvering*, 312 U.S. 552, 556 (1941); *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976). When intervening decisions attach legal significance to previously insignificant factual issues, the only way that principle can be vindicated is to allow further presentation of evidence in response to the new precedents. See, *e.g.*, *Jones* v. *City of Lubbock*, 640 F.2d 777, 777-778 (1981) (Goldberg, J., concurring) ("[D]ue process and precedent mandate that when the rules of the game are changed [by intervening Supreme Court decisions], the players must be afforded a full and fair opportunity to play by the new regulations" by "present[ing] further evidence on remand"), opinion supplemented on reh'g, 682 F.2d 504 (5th Cir. 1982); *Kirksey* v. *City of Jackson*, 625 F.2d 21 (5th Cir. 1980); *Shead* v.

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[10] As Justice Powell noted in *United States* v. *Richardson*, 418 U.S. 166 (1974), "repeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either. The public confidence essential to the former and the vitality critical to the latter may well erode if [the courts] do not exercise self-restraint in the utilization of [their] power to negative the actions of the other branches." *Id.* at 188 (Powell, J., concurring).

Quatso, 486 F.2d 694 (7th Cir. 1973); *Williams* v. *United States*, 282 F.2d 940 (6th Cir. 1960).

2. a. The Ninth Circuit's disposition of the government's appeal in this case is fundamentally at odds with this Court's decisions in *Turner I*, *Askew*, and *Storer* and with the principles of constitutional adjudication that underlie those decisions. In reliance upon this Court's intervening decision in *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1995), the court of appeals ruled that the constitutionality of Section 1304 turns on the scope and effect of the statute's exceptions, particularly the exception for Indian gambling. The record presented to the district court, however, simply did not address that issue. The record contains no evidence regarding the volume of gambling activities covered by the statutory exceptions or the amount and extent of broadcast advertising that those exceptions permit. The court of appeals therefore did not have a sufficient record to determine that, in practice, the statutory exceptions prevent Section 1304 from "directly advancing" the government's asserted interests. Given the Ninth Circuit's reading of *Coors*, "the manner in which the [statute] operates may be critical to the decision of the [constitutional] claim." *Askew*, 401 U.S. at 479. It therefore was improper for the court of appeals to strike down the statute "without fully developing the factual record at a hearing." *Ibid.*

The Ninth Circuit's error is particularly evident when the constitutional issue before the court of appeals in this case is compared to the constitutional issue before this Court in *Turner I*. Although the cases involve distinct First Amendment claims, the claims in both cases involve essentially the same underlying inquiry: whether the government has

"demonstrate[d] that * * * the regulation will in fact alleviate the[] [asserted] harms in a direct and material way." *Turner I*, 512 U.S. at 664 (opinion of Kennedy, J.); App., *infra*, 19a-20a. Indeed, the plurality in *Turner I* framed the constitutional inquiry there by employing the "direct advancement" test formulated in *Edenfield*, the commercial speech decision that underlies *Coors*. Faced with a record that was found insufficient to resolve that inquiry, this Court in *Turner I* returned the litigation to the district court for additional evidentiary proceedings. Faced with a record that was likewise insufficient to resolve the same inquiry, the court of appeals in this case chose to strike down the challenged statute instead.

b. The Ninth Circuit's failure to remand was particularly inappropriate because the court of appeals invalidated Section 1304 based on case law that had not been decided when the government was building its record in this case. The government was thus unfairly "surprised on appeal" because it had "no opportunity to introduce evidence" to meet the burden imposed by the court of appeals. See *Wulff*, 428 U.S. at 120. The Ninth Circuit therefore improperly penalized the government for "fail[ing] to provide any evidence" regarding the operation of the statutory exceptions (App., *infra*, 19a)—and on that basis proceeded improvidently to invalidate an Act of Congress. As indicated above, at the time that the district court record was developed in 1992, the government had no reason to think that an evidentiary showing regarding the statutory exceptions would be required. This Court had sustained the constitutionality of a similar restriction on gambling advertising in *Posadas*, and, in so doing, the Court had dismissed

the significance of comparable statutory exceptions without any evidentiary inquiry. See 478 U.S. at 341-344. More generally, *Posadas* had adopted a position of judicial deference toward the legislative judgments underlying commercial speech legislation. See *ibid.*

During the extended pendency of the appeal in this case, this Court's intervening commercial speech decisions departed from *Posadas* in significant respects. "Since *Posadas*, * * * this Court has examined more searchingly the [government's] professed goal, and the speech restriction put into place to further it, before accepting a * * * claim that the speech restriction satisfies First Amendment scrutiny." *44 Liquormart*, 116 S. Ct. at 1522 (O'Connor, J., joined by Rehnquist, C.J., and Souter & Breyer, JJ., concurring in the judgment); see also *id.* at 1511-1513 (Stevens, J., joined by Kennedy, Thomas & Ginsburg, JJ.). The Court's decision in *Coors*, which provided the principal basis for the Ninth Circuit's decision in this case, is one of the intervening decisions that reflect the "closer look" (*id.* at 1522) (O'Connor, J., joined by Rehnquist, C.J., and Souter & Breyer, JJ., concurring in the judgment) now required for commercial speech restrictions.[11] At the time that the government presented its evidence to the district court in this case, however, *Coors* lay more than two years in the

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[11] In making this observation, we do not concede that *Coors* is as far-reaching as the court of appeals regarded it to be. At this point in the litigation, however, it is unnecessary, and would be inappropriate, to pursue the Ninth Circuit's reading of *Coors* further. A remand is in order whether or not the Ninth Circuit's reading is correct, because the evidence adduced on remand may make any dispute over the breadth of *Coors* immaterial and thus eliminate the need for this Court to address the constitutional issue raised by the scope of *Coors*.

future.[12] Indeed, *Coors* was not decided until after the government's appeal in this case was taken under submission by the court of appeals. The government thus did not err in failing to present evidence to the district court in response to a case that had yet to be decided. Rather, the court of appeals erred in failing to allow the government to present evidence to the district court once the case had been decided and the court of appeals had made clear its belief that the case had altered the law.

c. That error led the court of appeals to utilize "a tool of last resort" and invalidate the action of a "co-equal branch[] of the Federal Government," *Valley Forge*, 454 U.S. at 474, even though there is a good chance that a more adequate record would show the statute to be within Congress's constitutional authority. The statutory exceptions to Section 1304 (see pp. 4-6, *supra*) involve activities that reasonably can be expected to have a less pervasive adverse impact than commercial casino gambling. In 1996, commercial casinos accounted for more than 40 percent ($19.1 billion) of the total gross gambling revenues in the United States. E.M. Christiansen, *The United States 1996 Gross Annual Wager*, International Gaming & Wagering Business, Aug. 1997, at 28, 32. In contrast, Indian gambling, the principal object of the Ninth Circuit's concern, accounted for approximately 11 percent of total gross gambling revenues ($5.3 billion). *Ibid.* Given the disparity between the volume of Indian gambling and the volume of commercial

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[12] As noted above, *Coors* relied primarily on the Court's earlier commercial speech decision in *Edenfield*. See *Coors*, 514 U.S. at 486-487. Like *Coors* itself, *Edenfield* was decided after the completion of the district court proceedings in this case.

casino gambling, there is good reason to believe that an evidentiary remand might well refute rather than confirm the Ninth Circuit's assumption that the Indian gambling exception defeats the purposes of Section 1304.

Because the Ninth Circuit acted improvidently in resolving the constitutionality of Section 1304 on the basis of a record that had become inadequate for that purpose, this Court need not reach the underlying First Amendment issues at this time—and indeed would likely find the record similarly inadequate for that purpose. Instead, the Court should vacate the judgment of the court of appeals and remand the case for further evidentiary proceedings. Because that course is so clearly appropriate under the governing decisions of this Court that we have discussed, the Court may wish to consider summary disposition of the case for that purpose.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for further proceedings.

Respectfully submitted.

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DECEMBER 1997

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-16191

D.C. No. CV-92-00400-PMP

VALLEY BROADCASTING COMPANY, DBA KVBC (TV), CHANNEL 13, LAS VEGAS, NEVADA, AND SIERRA BROADCASTING COMPANY, DBA KRNV (TV), CHANNEL 4, RENO, NEVADA, PLAINTIFFS

v.

UNITED STATES OF AMERICA; FEDERAL COMMUNICATIONS COMMISSION, DEFENDANTS-APPELLANTS

Argued and Submitted Feb. 15, 1995
Filed: Feb. 25, 1997

OPINION

Before: BRUNETTI* and O'SCANNLAIN, Circuit Judges; MERHIGE,** District Judge.

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* Pursuant to General Order 3.2.g, Judge Brunetti was drawn to replace Judge Tang, who died on July 18, 1995. Judge Brunetti has listened to the tape recording of oral argument and has read the briefs.

** The Honorable Robert R. Merhige, Jr., Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

O'SCANNLAIN, Circuit Judge:

We must determine whether regulations which criminalize the broadcast of advertisements for casino gambling are consistent with the First Amendment.

I

Commercial lotteries and the advertising thereof have long been the subjects of state and federal regulation. Indeed, as early as 1827, Congress provided that "no postmaster, or assistant postmaster, shall act as agent for lottery offices." Act of Mar. 2, 1827, § 6, 4 Stat. 238. By 1868, Congress had made it unlawful "to deposit in a post-office, to be sent by mail, any letters or circulars concerning lotteries, so-called gift concerts, or other similar enterprises offering prizes of any kind or any pretext whatsoever." Act of July 27, 1868, § 13, 15 Stat. 196. In 1890, Congress extended its mailing ban from letters and circulars to newspapers. Anti-Lottery Act of 1890, § 1, 26 Stat. 465; *see also Ex Parte Rapier*, 143 U.S. 110 (1892) (upholding 1890 Act against First Amendment challenge). And in 1895, Congress eliminated interstate lotteries altogether by prohibiting the transportation of lottery tickets in interstate commerce. Act of Mar. 2, 1895, § 1, 28 Stat. 963; *see also Champion v. Ames (Lottery Case)*, 188 U.S. 321 (1903) (upholding constitutionality of 1895 Act against challenge that it exceeded Congress' power under commerce clause).

Consistent with this regulatory tradition, Congress in 1934 enacted legislation criminalizing the broadcast advertisement of commercial lotteries. Communications Act of 1934, 48 Stat. 1064, 1088. This legislation is the predecessor of the statute at issue

here, 18 U.S.C. § 1304. In the years following the enactment of section 1304, Congress has amended the federal anti-lottery statutes on several occasions; however, Congress has chosen not to lift the ban on the broadcast advertisement of private casino gambling.

It is precisely this restriction which troubles our litigants. Valley Broadcasting Company and Sierra Broadcasting Company ("the Broadcasters") are Nevada corporations which own and operate television stations in Las Vegas and Reno, Nevada, respectively. The bulk of the Broadcasters' audience is located in Nevada; however, 4% (13,200/302,200) of all households receiving Valley Broadcasting signals reside in Utah, and 19% (37,200/197,200) of all households receiving Sierra Broadcasting signals reside in California. The Broadcasters desire to broadcast advertisements for casino gambling, an activity that is legal in the State of Nevada. The Broadcasters have declined to accept such advertising for fear of prosecution under 18 U.S.C. § 1304 and its implementing regulation, 47 C.F.R. § 73.1211.[1]

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[1] 18 U.S.C. § 1304 provides, in relevant part, that:

> Whoever broadcasts by means of any radio or television station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance . . . shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The language of 47 C.F.R. § 73.1211(a) is substantially identical. For this reason, the balance of this opinion will refer only to § 1304.

On May 14, 1992, the Broadcasters brought suit against the United States and the Federal Communications Commission (collectively "the government"), seeking declaratory and injunctive relief. Among other claims, the Broadcasters contended that 18 U.S.C. § 1304 and 47 C.F.R. § 73.1211 violate the First Amendment of the United States Constitution.[2] The government disagreed.

The district court agreed with the Broadcasters and struck down the regulations as unconstitutional. The government appeals.

II

We begin our endeavor by remarking upon the unique protections afforded that speech which is commonly designated "commercial." It is without doubt that "[t]he First Amendment . . . protects commercial speech from unwarranted governmental regulation." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561-62 (1980) (rejecting "the 'highly paternalistic' view that gov-

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[2] Because the federal government is, at present, not prosecuting the Broadcasters under the challenged regulations, standing will exist only if the Broadcasters can demonstrate a "reasonable threat of prosecution for conduct allegedly protected by the Constitution." *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 625 n. 1 (1986). The district court concluded that the Broadcasters had standing to adjudicate this case. We agree.

The Broadcasters have alleged the nature and content of the of the advertisements they wish to broadcast. The Federal Communications Commission, which actively enforces the challenged regulations, has historically found similar advertisements in violation of these provisions. Accordingly, the Broadcasters have demonstrated a "reasonable threat of prosecution" and thus have standing to assert their challenge.

ernment has complete power to suppress or regulate commercial speech"). That said, we note that such protection is less than that afforded other constitutionally protected expression. *See id.* at 563. Accordingly, restrictions that might be inconsistent with the First Amendment's protection of other varieties of speech are tolerated in the area of commercial speech.

In *Central Hudson*, the Supreme Court articulated a four-part test under which to analyze the constitutionality of government regulations limiting commercial speech:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566.[3]

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[3] The Broadcasters claim in passing that § 1304 is a content-based regulation of speech. Thus, they contend, under the standard set forth in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), § 1304 must be subject to strict scrutiny.

Although *R.A.V.* requires that the content-based regulation of proscribable classes of speech be subject to strict review, it is unclear whether *R.A.V.*'s holding extends to commercial speech. Despite a suggestion in *R.A.V.* that strict scrutiny indeed does apply to the content-based regulation of commercial speech, *see id.* at 388-89 (suggesting that state regula-

The parties agree that the advertising at issue is neither illegal nor misleading. Rather, their dispute centers around the remaining three prongs of *Central Hudson*. We treat each prong in turn.

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tion of price advertising would fall within parameters of *R.A.V.* in certain contexts), the Supreme Court has continued to apply *Central Hudson* in the commercial speech context in cases following *R.A.V.* *See United States v. Edge Broadcasting Co.*, 113 S.Ct. 2696 (1993) (applying *Central Hudson* to First Amendment challenge to 18 U.S.C. § 1307). Several courts have, however, either applied or considered the potential application of *R.A.V.* to regulations restricting commercial speech. *See MD II Entertainment Inc. v. City of Dallas*, 28 F.3d 492, 495 (5th Cir.1994) (recognizing potential application of *R.A.V.* in commercial speech context); *Hornell Brewing Co. v. Brady*, 819 F.Supp. 1227, 1232-33 (E.D.N.Y. 1993) (applying both *Central Hudson* and *R.A.V.* without deciding which is required); *Citizens United for Free Speech II v. Long Beach Township Bd. of Comm'rs*, 802 F.Supp. 1223, 1232 (D.N.J. 1992) ("It is clear from the Supreme Court's recent decision in *R.A.V. v. St. Paul*, that commercial speech must be protected by the usual strictures against content-based distinctions.").

Although the applicability of *R.A.V.* in the commercial speech context poses a question of interest, we need not resolve it. Even were we to conclude that *R.A.V.* applied, we are persuaded that § 1304 would nonetheless fall outside its scope. As *R.A.V.* makes clear, a "valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular secondary effects of the speech, so that the regulation is justified without reference to the content of the . . . speech." *Id.* (quotation omitted). Here, the government justifies § 1304 by reference to the social ills uniquely attendant to casino gambling, and not by the content of the speech itself. *See Citizens United*, 802 F.Supp. at 1233 (recognizing secondary effects exception to *R.A.V.* in commercial speech context, but concluding that defendants had not presented sufficient evidence of such).

A

The government asserts two interests. First, the government contends, it has an interest in reducing public participation in commercial lotteries. Second, the government claims, it has a substantial interest in protecting those states that choose not to permit casino gambling within their borders.

With regard to its first interest, the government explains that "[s]ection 1304 serves an independent federal interest in discouraging public participation in commercial lotteries, including casino gambling, and thereby minimizing the wide variety of social ills that have historically been associated with these forms of gambling." The district court rejected this interest outright, concluding that the government had presented no specific evidence to support its claim that modern day lotteries are the vehicles of social ills.

The district court was correct in its premise. The government's burden "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real. . . ." *Edenfield v. Fane*, 113 S.Ct. 1792, 1800 (1993); *see also Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 648 (1984) (rejecting State's asserted interest in ban on illustrations in advertising by attorneys because "[t]he State's arguments amount to little more than unsupported assertions; nowhere does the State cite any evidence or authority of any kind for its contention . . ."). This requirement does not, however, rise to the level of strict scrutiny; we have expressly held that "the asserted governmental interest must be

'substantial,' rather than 'compelling.'" *Association of Nat'l Advertisers, Inc. v. Lungren*, 44 F.3d 726, 729 (9th Cir.1994), *cert. denied*, 116 S. Ct. 62 (1995) (applying the "'more relaxed inquiry'" of intermediate scrutiny to restrictions on commercial speech).

Applying these principles, we are persuaded that the harms sought to be avoided are real. The government included in its pretrial papers excerpts from a 1984 hearing before the President's Commission on Organized Crime. These excerpts address, in part, "the attraction of traditional organized crime groups to licensed casinos." *Organized Crime and Gambling: Hearings Before the President's Commission on Organized Crime*, at vii (June 1985). Although it is true that the scope of the government's submissions is not extensive, and although portions of the proffered hearings suggest that "the threat of organized crime control has diminished considerably," *id.* at 22, the report when read in its entirety indicates that a link exists between casino gambling and organized crime. *See id.* at 617 (noting connection between casino employees and organized crime); *id.* at 622 (noting "substantial organized crime involvement" in the junket industry); *id.* at 801-03 (discussing methods employed by organized crime to "skim" money from casino gambling operations); *id.* at 805-12 ("Increasingly, organized crime has used casinos like private banks to launder the proceeds of narcotics trafficking."); *id.* at 515-17 (testimony of member of organized crime family regarding Chicago crime family's control of Las Vegas casinos); *id.* at 528-31 (discussing money laundering schemes employed in private casinos).

Further supporting the government's interest is the fact that the Supreme Court, in *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328 (1986), recognized as substantial an interest very similar to that asserted by the government here. The *Posadas* Court rejected a First Amendment challenge to legislation enacted by Puerto Rico which prohibited the advertisement of casino gambling aimed at residents of the Commonwealth. Puerto Rico asserted as its interest a desire to reduce the demand for casino gambling among its residents; specifically, the legislature was concerned that "[e]xcessive casino gambling among local residents . . . would produce serious harmful effects on the health, safety, and welfare of the Puerto Rican citizens, such as the disruption of moral and cultural patterns, the increase in local crime, the fostering of prostitution, the development of corruption, and the infiltration of organized crime." *Id.* at 341 (quotation omitted). The Supreme Court had "no difficulty in concluding that the Puerto Rico Legislature's interest in the health, safety, and welfare of its citizens constitutes a 'substantial' government interest." *Id.*; *see also United States v. Edge Broadcasting Co.*, 113 S.Ct. 2696, 2703 (1993) (recognizing gambling as a "vice"); *cf. Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (city has substantial interest in "preserving the quality of life in the community at large"), *cert. denied*, 475 U.S. 1132 (1986). We similarly conclude that the government's interest in discouraging the public from participating in commercial lotteries is sufficiently substantial to meet the requirements of *Central Hudson.*

We note that the government, throughout this litigation, has defined its interest broadly as reducing public participation in commercial lotteries. The evidence it has submitted to us pertains primarily to the pernicious effects of casino gambling. We will not take it upon ourselves to narrow the government's asserted interest sua sponte, however. Indeed, in light of the historical tradition of the regulation of commercial lotteries, we are persuaded that discouraging participation in such games of chance overall is a substantial interest.

We turn to the government's second asserted interest—"to assist states that prohibit casino gambling . . . by regulating interstate activities such as broadcasting that are beyond the powers of the individual states to regulate." The district court, casting this interest as accommodating the lottery policies of all states, recognized it as substantial. The government now asserts that the district court mischaracterized its interest. As the government explains, its interest is not in protecting state choice, but in protecting those states that choose not to permit casino gambling.[4]

The interest in protecting non-casino states was indirectly recognized in *Champion v. Ames*, 188 U.S.

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[4] This alleged mischaracterization is significant because the district court went on to rule that § 1304 did not directly advance the government's interest. The government concedes that if the protection of state choice were indeed its interest, the regulations at issue would not satisfy *Central Hudson*; however, the government contends, when the proper interests are recognized, the fit between legislative means and ends becomes clear.

321 (1903). In ruling that Congress had the authority to prohibit the interstate transport of lottery tickets, the Court stated:

> In legislating upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those States—perhaps all of them—which, for the protection of the public morals, prohibit the drawing of lotteries . . . within their respective limits. It said, in effect, that it would not permit the declared policy of the States, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by an agency of interstate commerce.

Id. at 357. Although *Champion* is not directly on point, we read it to suggest that the government may indeed legitimately favor the interests of non-casino states.[5]

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[5] The government seeks further to support its interest by citing to legislative history. However, the cited history, although containing discussions of the need to protect non-lottery states, does so in a context which expressly recognizes state choice as the underlying interest. *See* S. Rep.No. 98-537, 98th Cong., 2d Sess., at 11-12 (Statement of Sen. Hatch) ("The laws currently in effect recognize the right of the individual states to make those decisions concerning lotteries and gaming that best respond to the desires of the people."); *see also* 1974 U.S.C.C.A.N. at 7011. Nonetheless, because the asserted interest need not be the original interest behind the legislation, the absence of support in the legislative history does not doom the government's purported interest. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 (1983) (noting that the "insufficiency of the original motivation does not diminish other interests that the restriction may now serve").

We cannot ignore the fact that broadcast signals cannot be contained within state borders and individual states cannot control interstate broadcasts. Thus, as demonstrated here, advertisements that are broadcast from states which permit casino gambling will be viewed by residents in states which prohibit such conduct. Without the assistance of the federal government, non-casino states will have no effective means to protect their residents from such spillover; their antigambling policies would thus be compromised.

In reaching the conclusion that this second interest is indeed substantial, we reject the Broadcasters' assertion that our holding conflicts with *United States v. Edge Broadcasting Co.*, 113 S.Ct. 2696 (1993). In *Edge Broadcasting*, the Court upheld against First Amendment challenge federal statutes which prohibited the broadcast of lottery advertising by those broadcasters licensed in states which did not allow lotteries, while allowing such broadcasting by broadcasters in states where lotteries were permitted. In reaching its conclusion, the Court recognized as substantial the government's purported interest in protecting state choice. *See id.* at 2703-04. Nowhere in the opinion did the Court reason that the protection of non-lottery states at the expense of lottery states was unconstitutional, however. Indeed, there is language in *Edge Broadcasting* that suggests that the protection of non-lottery states may be a substantial interest. *See id.* at 2703 ("[W]e are quite sure that the government has a substantial interest in supporting the policy of nonlottery States, as well as not interfering with the policy of States that permit lotteries.").

B

Having found both of the government's articulated interests to be substantial, we must next determine whether section 1304 directly advances these interests. Ultimately, what is required is "a fit between the restriction and the government interest that is not necessarily perfect, but reasonable." *Edge Broadcasting*, 113 S. Ct. at 2705. However, "the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." *Edenfield*, 113 S.Ct. at 1800 (quotations omitted). Rather, the government must demonstrate that "its restrictions will in fact alleviate [the asserted harms] to a material degree." *Id.*

We take special note of the recent decision in *44 Liquormart, Inc. v. Rhode Island*, 116 S.Ct. 1495 (1996), where the Supreme Court unanimously struck down two Rhode Island statutes which prohibited the advertising of alcoholic beverage retail prices anywhere other than at point of purchase.[6] While all nine justices concurred in the judgment, none of the rationales for doing so was able to garner a majority. Justice Stevens, joined by Justices Kennedy and Ginsburg, stated that in the context of the "drastic nature of the means chosen" to forward the state's interest in promoting temperance—"the wholesale suppression of truthful, nonmisleading informa-

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[6] The Supreme Court recently granted certiorari in *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 69 F.3d 1296 (5th Cir.1995) and summarily remanded the case to the Fifth Circuit for further consideration in light of *44 Liquormart*. In *Greater New Orleans*, the Fifth Circuit had upheld the constitutionality of the very statute at issue in this case, 18 U.S.C § 1304 as amended by § 1307.

tion,"—the Court must determine whether the "price advertising ban will *significantly* reduce alcohol consumption." 116 S. Ct. at 1509 (emphasis in original). Justice Stevens firmly stated that Rhode Island could not rely upon mere "speculation and conjecture" to advance its interests. *Id.* at 116 S. Ct. at 1510. While *44 Liquormart* fails to present a coherent framework for reviewing these claims, one point is clear: the government's asserted interest in reducing demand for casino gambling seems less likely to succeed following the Court's decision.

By eliminating a potent means of persuasion, section 1304 would appear to advance directly the government's interest in discouraging public participation in commercial lotteries. It is true that, as the Broadcasters assert, the government has presented no studies demonstrating the link between public participation in gambling and the advertising thereof. *See Edenfield*, 113 S. Ct. at 1800-01 (rejecting State's claim that ban on personal solicitation by CPAs directly advanced State's interest in insuring ethical nature of practice because State presented no evidence of such connection). However, common sense suggests that advertising increases participation; indeed, were this not so, it is unlikely that casinos would seek to advertise on the Broadcasters' stations. Moreover, the Supreme Court has expressly recognized the connection between advertising and demand. *See Posadas*, 478 U.S. at 341-42 (concluding that ban on casino advertisements would serve to reduce public participation in casino gambling); *see also Central Hudson*, 447 U.S. at 557 (State's interest in reducing demand for electricity directly advanced by ban on promotional advertising).

That said, we are troubled by the numerous exceptions to section 1304. Although criminalizing broadcast advertising by commercial lotteries, the regulatory scheme at issue here permits the following lotteries to advertise via the airwaves: state-run lotteries, fishing contests, not-for-profit lotteries, lotteries conducted as promotional activities by commercial organizations, and, perhaps most significantly, any gaming conducted by Indian Tribes pursuant to the Indian Gaming Regulatory Act. See 47 C.F.R. § 73.1211(c). The question we thus must resolve is whether the existence of these myriad exceptions precludes section 1304 from directly advancing the government's purported interests.

We take guidance from the Supreme Court's recent decision in *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995). In *Coors Brewing*, the Court held 27 U.S.C. § 205(e)(2), which prohibited brewers from disclosing on labels the alcohol content of their beers, to be inconsistent with the First Amendment. The Court agreed with the government that the speech at issue concerned a lawful activity, and that the government's asserted interest—avoiding "strength wars"—was substantial. The Court was not persuaded that section 205(e)(2) directly advanced the asserted interest, however. In reaching this conclusion, the Court emphasized the numerous exceptions to section 205(e)(2), specifically noting that the regulatory scheme permitted both the disclosure of alcohol content in advertising (although prohibiting it on labels) and the disclosure of alcohol content on the labels of distilled spirits (although prohibiting it on beers). Deeming such a regulatory scheme "irrational," the Court explained that "[t]here is little

chance that [the regulation at issue] can directly and materially advance its aim, while other provisions of the same act directly undermine and counteract its effect." *Id.* at 1593.

The government has consistently characterized its primary interest as "discouraging public participation in commercial lotteries, including casino gambling, and thereby minimizing the wide variety of social ills that have historically been associated with these forms of gambling." By the government's own description, then, its interest is an extremely broad one— reducing public participation in all *commercial lotteries*. Taking the government's claim at face value, the statutory scheme here would appear to be flawed in the same manner as section 205(e)(2) was in *Coors Brewing*. That is, because section 1304 permits the advertising of commercial lotteries by not-for-profit organizations, governmental organizations and Indian Tribes, it is impossible for it materially to discourage public participation in commercial lotteries. To use the language of *Coors Brewing*, "[t]here is little chance that [the challenged regulation] can directly and materially advance its aim, while other provisions of the same act directly undermine and counteract its effects." *Coors Brewing*, 115 S.Ct. at 1593.

In reaching our conclusion, we are not unmindful of the Supreme Court's earlier decision in *Posadas de Puerto Rico v. Tourism Co.*, 478 U.S. 328 (1986). In *Posadas*, the Court squarely rejected the argument that, because the challenged regulation permitted horse races, cockfights, and the lottery to advertise, the regulation could not advance the government's interest. The Court reasoned: "whether other kinds

of gambling are advertised in Puerto Rico or not, the restrictions on advertising of casino gambling 'directly advance' the legislature's interest in reducing demand for games of chance." *Id.* at 342.

In reconciling our decision with *Posadas*, we note the substantial distinction between *Posadas* and the case that the government has presented here.[7] In *Posadas*, Puerto Rico defined its interest narrowly as "the reduction of demand for casino gambling by the residents of Puerto Rico." *Id.* at 341. As the Court explained,

> the legislature's interest, as previously identified, *is not necessarily to reduce demand for all games of chance, but to reduce demand for casino gambling.* . . . In other words, the legislature felt that for Puerto Ricans the risks associated with casino gambling were significantly greater than those associated with the more traditional kinds of gambling in Puerto Rico.

Id. at 342-43 (emphasis added).

Here, however, the government has consistently articulated as its interest the desire to reduce public participation in *all commercial lotteries*. Permitting

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[7] We note that following *44 Liquormart* much of the Court's reasoning in *Posadas*—especially its unquestioning acceptance of the state's assertions that the casino advertising ban furthered the government's interest in reducing the demand for gambling without being more extensive than necessary to serve that interest—is no longer as compelling. *See 44 Liquormart*, 116 S. Ct. at 1522 (O'Connor, J., concurring) ("The closer look that we have required since *Posadas* comports better with the purpose of the analysis set out in *Central Hudson*, by requiring the State to show that the speech restriction directly advances its interest and is narrowly tailored.")

some commercial lotteries to advertise—as 47 C.F.R. § 73.1211(c) does—would without doubt undermine this broad interest. Nor will recasting the government's interest to be merely the reduction of public participation in casino gambling aid the government. Here, unlike *Posadas*, the regulations contain an exception even for casino gambling—casinos operated by Indian Tribes pursuant to the terms of the Indian Gaming Regulatory Act are exempted from the provisions of section 1304.[8] *See* 47 C.F.R. § 73.1211(c)(3).

Having concluded that the government's purported interest in reducing participation in commercial lotteries fails to satisfy *Central Hudson*, we are left to consider whether the government's remaining interest meets this test. As noted, the government's second asserted interest is "to assist states that

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[8] This exception is significant to the government's own attempt to distinguish *Coors Brewing*. The government argues that "the problem in *Coors* was that the commercial speech allowed by Congress was *worse*, in terms of the 'strength war' policy, than the speech prohibited by Congress." In contrast, the government suggests, the exceptions enacted to section 1304 are readily explained "either in terms of the less pervasive impact of the advertised activities (for example, local charitable gambling) or the countervailing social benefits (federally regulated Indian gambling)."

Even accepting as true the government's purported distinction, we remain unpersuaded that the speech prohibited here is "worse" than that which is permitted. The government identifies casino gambling as the most pernicious and pervasive form of commercial lottery. What the government fails to recognize, however, is that it permits that speech which it claims to be most pernicious, by exempting Indian casinos from the reach of its regulations. Nor are we persuaded that "countervailing social benefits" are a relevant part of an analysis of direct advancement.

prohibit casino gambling . . . by regulating interstate activities such as broadcasting that are beyond the powers of the individual states to regulate."

The government argues that broadcast signals are not contained within state borders and tnat states cannot regulate the interstate transmission of broadcasting; accordingly, there is likely to be some spillover of casino advertisements from states in which casino gambling is permitted into neighboring states in which it is not. By prohibiting the advertising of casino gambling in *all* states, the government avoids this spillover, effectively keeping broadcast advertisements out of those states which have determined that casino gambling is undesirable. This, the government suggests, directly advances its interest.

Again, however, we are concerned by the numerous exceptions to section 1304. In particular, our attention is drawn to 47 C.F.R. § 73.1211(c)(3), which excludes "[a]ny gaming conducted by an Indian Tribe pursuant to the Indian Gaming Regulatory Act" from the reach of section 1304. Such exemption permits Indian Tribes to advertise both in states which allow casino advertising and in those which forbid it. This would appear to undermine the government's purported interest in protecting non-casino states from the reach of casino advertisements on the airwaves. It may be that such advertising is limited in scope, intruding little on non-casino states, and thus does not interfere with the government's interest in protecting those states. Unfortunately, however, the government has failed to provide any evidence demonstrating this fact—in the process failing to demonstrate that "its restrictions will in fact alleviate [the

asserted harms] to a material degree." *Edenfield*, 113 S. Ct. at 1800. Again, *Coors Brewing* and *44 Liquormart* counsel against holding that section 1304 satisfies the requirements of *Central Hudson*.[9]

III

Having concluded that section 1304 and the regulations thereunder fail to satisfy *Central Hudson*, we are compelled to strike them down as an unconstitutional infringement of the Broadcasters' First Amendment rights.

AFFIRMED.

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[9] Because we conclude that the challenged regulations do not directly advance the government's interests, we need not reach the final prong of *Central Hudson*.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-16191

D.C. No. CV-92-00400-PMP

VALLEY BROADCASTING COMPANY, DBA KVBC (TV), CHANNEL 13, LAS VEGAS, NEVADA, AND SIERRA BROADCASTING COMPANY, DBA KRNV (TV), CHANNEL 4, RENO, NEVADA, PLAINTIFFS

v.

UNITED STATES OF AMERICA; FEDERAL COMMUNICATIONS COMMISSION, DEFENDANTS-APPELLANTS

[Filed Aug. 25, 1997]

ORDER

Before: BRUNETTI and O'SCANNLAIN, Circuit Judges; MERHIGE,* District Judge.

The panel has voted to deny the petition for rehearing. Judge Brunetti and Judge O'Scannlain have voted to reject the suggestion for rehearing en

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* The Honorable Robert R. Merhige, Jr., Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

banc, and Judge Merhige recommends rejecting the suggestion.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to hear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX C

UNITED STATES DISTRICT COURT,
D. NEVADA

No. CV-S-92-400-PMP (RJJ)

VALLEY BROADCASTING COMPANY, DBA KVBC (TV), CHANNEL 13, LAS VEGAS, NEVADA, AND SIERRA BROADCASTING COMPANY, DBA KRNV (TV), CHANNEL 4, RENO, NEVADA, PLAINTIFFS

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, DEFENDANTS

April 13, 1993

ORDER

PRO, District Judge.

Before the Court for consideration are Plaintiffs Valley Broadcasting Company and Sierra Broadcasting Company's Motions for Summary Judgment (# 18 and # 23) and Defendants United States of America and Federal Communications Commission's Cross-Motion for Summary Judgment (# 24).

I. Facts

Plaintiff Valley Broadcasting Company ("Valley") is a Nevada corporation licensed by the Federal Communications Commission ("FCC") to operate a television station, KVBC, in Las Vegas, Nevada. The

primary geographic market which KVBC serves is Las Vegas and Southern Nevada. KVBC's transmitter, however, has the capacity to produce a grade B signal which reaches the Utah/Nevada border.[1] Based on this, potentially 4% (13,200/302,200) of all households which may receive KVBC signals are Utah citizens. Similarly, Plaintiff Sierra Broadcasting Company ("Sierra") is a Nevada corporation licensed by the FCC to operate KRNV, a television station located in Reno, Nevada. Although the primary broadcast area for KRNV is Reno, approximately 19% (37,200/197,200) of the households which receive KRNV signals reside in California. *See* Cross-Motion for Summary Judgment (# 24), Exhibit C.[2]

Plaintiffs desire to broadcast commercials related to legal gaming activities located in Nevada such as blackjack, craps, poker, roulette, slot machines, and other lawful games of chance. Reply (# 28) at 3.[3]

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[1] Typically, television signals are broken down into two signals: one, a grade A or city grade signal, and two, a grade B signal. Although a grade B signal is theoretically strong enough to be viewable, a number of things such as the physical contours of the surrounding area (e.g., mountains) may affect the overall reception of a grade B signal. *See* Counter-Motion for Summary Judgment (# 24), Exhibit C at 14-23.

[2] Approximately 1,800,000 people presently live in Utah, while California's population is approximately 30,400,000. Statistical Abstract of the United States 1992, 112th Ed., at 22.

[3] It is undisputed that advertising of casino gambling is pervasive in Nevada including, but not limited to, such modes as billboards, outdoor advertising, flyers, magazines, newspapers, direct mail, brochures, and cable television other than origination cablecasting. Motion for Summary Judgment (# 18), Exhibit 3 at 2; Second Motion for Summary Judgment (# 23), Exhibit 12. In addition, advertisements relating to

Plaintiffs, however, have been deterred from doing so based on the FCC's enforcement of 18 U.S.C. § 1304[4] and 47 C.F.R. § 73.1211[5], which prohibit the broadcast

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casino gaming may be received by residents in adjacent states through such means as billboards on interstate highways and the receipt of Nevada periodicals and newspapers such as the Las Vegas Review Journal. Motion for Summary Judgment (# 18), Exhibit 5; Second Motion for Summary Judgment (# 23), Exhibits 11, 12.

[4] 18 U.S.C. § 1304 provides:

> Whoever broadcasts by means of any radio or television station for which a license is required by any law of the United States, or whoever, operating any such station knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, whether said list contains any part or all of such prizes, shall be fined not more than $1,000 or imprisoned not more than one year or both.
>
> Each day's broadcasting shall constitute a separate offense.

[5] 47 C.F.R. § 73.1211 provides in pertinent part:

> (a) No licensee of an AM, FM, or television broadcast station, . . ., shall broadcast any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependant in whole or in part upon lot or chance, . . .
>
> (b) The determination whether a particular program comes within the provisions of paragraph (a) of this section depends on the facts of each case. However, the Commission will in any event consider that a program comes within the provisions of paragraph (a) of this section if in connection with such program a prize consisting of money or other thing of value is awarded to any person whose selection is dependent in whole or in part upon lot or chance, if as a condition of winning or competing for such prize, such winner or winners are

of all promotional advertising involving casino gambling. Motion for Summary Judgment (# 18), Exhibit 3 at 3.[6] In support of this policy, the FCC maintains

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required to furnish any money or other thing of value . . .

(c) The provisions of paragraphs (a) and (b) of this section shall not apply to an advertisement, list of prizes or other information concerning:

(1) A lottery conducted by a State acting under the authority of State law which is broadcast by a radio or television station licensed to a location in that State or any other State which conducts such a lottery. . . .

(3) Any gaming conducted by an Indian Tribe pursuant to the Indian Gaming Regulatory Act. . . .

(4) A lottery, gift enterprise or similar scheme . . . that is authorized or not otherwise prohibited by the State in which it is conducted and which is:

(i) Conducted by a not-for-profit organization or a governmental organization; or

(ii) Conducted as a promotional activity by a commercial organization and is clearly occasional and ancillary to the primary business of that organization.

(d)(1) For purposes of paragraph (c) of this section, "lottery" means the pooling of proceeds derived from the sale of tickets or chances and allotting those proceeds or parts thereof by chance to one or more chance takers or ticket purchasers. It does not include the placing or accepting of bets or wagers on sporting wagers or contests.

[6] Although Plaintiffs cannot point to any current criminal prosecution under § 1304, the record is clear that the FCC actively enforces both § 1304 and § 73.1211 through the issuance of fines and other penalties. Second Motion for Summary Judgment (# 23), Exhibits 8, 9, and 10.

that it has a substantial interest in inhibiting the growth of legalized gambling and its perceived social ills, as well as a federalism interest in furthering the public policies of California and Utah which prohibit casino gambling. *See* Cross-Motion for Summary Judgment (# 24) at 41-48: Reply (# 40) at 7-16.

Plaintiffs seek injunctive relief and a declaratory judgment from this Court that gambling and casino activities which are legal in the State of Nevada do not come within the scope of § 1304 or § 73.1211, or if they do, that the statute and regulation as construed by the FCC are unconstitutional. Plaintiffs argue that: (1) advertising casino gaming is not a "lottery, gift enterprise, or similar scheme" within the meaning of § 1304 and § 73.1211; (2) that § 1304 and § 73.1211 as applied to casino gambling violate the First Amendment's protection of commercial speech; and (3) the FCC's prohibition on advertising of casino gaming by television or radio stations, and not other forms of the media, violates the Equal Protection Clause.

II. Standard of Review

Pursuant to Federal Rule of Civil Procedure 56, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The party moving for summary judgment has the initial burden of showing the absence of a genuine issue of material fact. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S. Ct. 1598, 26 L.Ed.2d 142 (1970);

Zoslaw v. MCA Distrib. Corp., 693 F.2d 870, 883 (9th Cir. 1982). Once the movant's burden is met by presenting evidence which, if uncontroverted, would entitle the movant to a directed verdict at trial, the burden then shifts to the respondent to set forth specific facts demonstrating that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). If the factual context makes the respondent's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 1355-56 (1986); *California Arch. Bldg. Prod. v. Franciscan Ceramics*, 818 F.2d 1466, 1468 (9th Cir. 1987), *cert. denied*, 484 U.S. 1006, 108 S. Ct. 698, 98 L.Ed.2d 650 (1988).

If the party seeking summary judgment meets this burden, then summary judgment will be granted unless there is significant probative evidence tending to support the opponent's legal theory. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290, 88 S. Ct. 1575, 1593, 20 L.Ed.2d 569 (1968); *Commodity Futures Trading Commission v. Savage*, 611 F.2d 270 (9th Cir. 1979). Parties seeking to defeat summary judgment cannot stand on their pleadings once the movant has submitted affidavits or other similar materials. Affidavits that do not affirmatively demonstrate personal knowledge are insufficient. *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978), *cert. denied*, 440 U.S. 981, 99 S. Ct. 1790, 60 L.Ed.2d 241 (1979). Likewise,

"legal memoranda and oral argument are not evidence and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment." *Id.*

A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the differing versions of the truth. *See Admiralty Fund v. Hugh Johnson & Co.*, 677 F.2d 1301, 1305-06 (9th Cir. 1982); *Admiralty Fund v. Jones*, 677 F.2d 1289, 1293 (9th Cir. 1982).

All facts and inferences drawn must be viewed in the light most favorable to the responding party when determining whether a genuine issue of material fact exists for summary judgment purposes. *Poller v. CBS, Inc.*, 368 U.S. 464, 82 S. Ct. 486, 7 L.Ed.2d 458 (1962). After drawing inferences favorable to the respondent, summary judgment will be granted only if all reasonable inferences defeat the respondent's claims. *Admiralty Fund v. Tabor*, 677 F.2d 1297, 1298 (9th Cir. 1982).

The trilogy of Supreme Court cases cited above establishes that "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp.*, 477 U.S. at 327, 106 S. Ct. at 2555, *quoting* Fed. R. Civ. P. 1). *See also Avia Group Int'l. Inc. v. L.A. Gear Cal.*, 853 F.2d 1557, 1560 (Fed. Cir. 1988).

III. Discussion

A. Standing

Defendants contend that Plaintiffs do not have standing to challenge § 1304 and § 73.1211. More specifically, Defendants contend that Plaintiffs are not presently threatened with prosecution under § 1304, and that Plaintiffs have not given any particulars about the advertisements which they desire to broadcast. Cross-Motion for Summary Judgment (# 24) at 10. This Court disagrees.

As illustrated by the Exhibits submitted by Plaintiffs, the FCC actively enforces the provisions of § 1304 and § 73.1211 through the use of fines ranging up to $12,500. Second Motion for Summary Judgment (# 23), Exhibit 8. Moreover, Plaintiffs have clearly stated the nature and content of the advertisements which they desire to broadcast, and the FCC has historically found similar advertisements in violation of these provisions. Second Motion for Summary Judgment (# 23), Exhibits 8, 9, and 10. Accordingly, since Plaintiffs have demonstrated a reasonable threat of injury as a result of the FCC's enforcement of § 1304 and § 73.1211, this Court finds that Plaintiffs have standing to bring their present claims. *See Adult Video Association v. Barr*, 960 F.2d 781, 785-86 (9th Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3371 (Nov. 2, 1992).

B. The Applicability of § 1304 to Casino Gambling

Plaintiffs argue that § 1304, by its terms, does not prohibit broadcasting advertisements relating to casino gaming. Plaintiffs insist that in order to fall within the scope of § 1304, the advertisement must relate to a "lottery, gift enterprise, or similar

scheme." Plaintiffs contend that since casino games such as blackjack, craps, or roulette are qualitatively different than a "lottery" or "gift enterprise," such games cannot be considered "similar schemes" under § 1304.[7]

The seminal case which defines the terms "lottery, gift enterprise, or similar scheme" is *F.C.C. v. American Broadcasting Co.*, 347 U.S. 284, 74 S. Ct. 593, 98 L.Ed. 699 (1954). In *American Broadcasting*, recognizing that the language and legislative history of § 1304 was somewhat unclear, the Supreme Court stated that there are three essential elements of a "lottery, gift enterprise, or similar scheme": (1) the distribution of prizes; (2) according to chance; (3) for consideration. *Id.* at 289-91, 74 S. Ct. at 597-98; *see also* 47 C.F.R. § 73.1211(b).

Applying these elements to the casino activities which Plaintiffs desire to advertise in Nevada leads to the inescapable conclusion that such games fall within the reach of § 1304. There can be no real dispute that the money bet in such games qualifies as consideration, the money received upon a successful wager constitutes a prize, and that winning these

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[7] The narrow meaning which Plaintiffs ascribe to the terms of "lottery" and "gift enterprise" are discussed in a footnote in *F.C.C. v. American Broadcasting Co.*, 347 U.S. 284, 74 S. Ct. 593, 98 L.Ed. 699 (1954) which stated:

> A typical 'lottery' is a scheme in which tickets are sold and prizes are awarded among the ticketholders by lot. A typical 'gift enterprise' differs from this in that it involves the purchase of merchandise or other property; the purchaser receives, in addition to the merchandise or other property, a 'free' chance in a drawing.

Id. at 290, n. 8, 74 S. Ct. at 598, n. 8.

games is dependant largely on chance. Therefore, Plaintiffs' argument that casino gaming does not fall within the scope of § 1304 must be rejected.

C. First Amendment

Plaintiffs next argue that a ban on the proposed gaming advertisements violates their rights to commercial free speech under the First Amendment.

In *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 100 S. Ct. 2343, 65 L.Ed.2d 341 (1980), the Supreme Court recognized that First Amendment protects commercial speech, or speech which is related solely to the economic interests of the speaker and its audience, from unwarranted governmental regulation because it serves the "economic interest of the speaker, . . . assists consumers and furthers the societal interest in the fullest possible dissemination of information." *Id.* at 562-63, 100 S. Ct. at 2349-50. The Supreme Court further recognized that:

> In applying the First Amendment to this area, we have rejected the 'highly paternalistic' view that government has complete power to suppress or regulate commercial speech. '[P]eople will perceive their own best interests if only they are well enough informed and . . . the best means to that end is to open the channels of communication, rather than to close them.'

Id. at 562, 100 S. Ct. at 2349 (citations omitted).

Based on these principles, the Supreme Court in *Central Hudson* established a four-part analysis for evaluating the constitutionality of governmental regulations limiting commercial speech. Under this analysis, a court must ask: (1) does the commercial

speech involved concern lawful activity which is not misleading; (2) if so, is there a substantial governmental interest in regulating such speech; (3) if so, does the regulation directly advance the governmental interest asserted; and finally, (4) is the regulation more extensive than necessary to serve the governmental interest. *Central Hudson*, 447 U.S. at 566, 100 S. Ct. at 2351; *Board of Trustees, State Univ. of N.Y. v. Fox*, 492 U.S. 469, 475, 109 S. Ct. 3028, 3032, 106 L.Ed.2d 388 (1989). In applying this analysis to the case, the FCC bears the burden of demonstrating a substantial state interest, as well as justifying the scope of any restrictions advancing this interest. *See Fox*, 492 U.S. at 480, 109 S. Ct. at 3034; *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 647, 105 S. Ct. 2265, 2279, 85 L.Ed.2d 652 (1985).

With regard to the first prong, Defendants concede, as they must, that the advertisements which Plaintiffs propose to broadcast relate to lawful activity within the State of Nevada and are not misleading. Cross-Motion for Summary Judgment (# 24) at 41, n. 25. Therefore, this Court has little difficulty finding that advertisements relating to lawful casino gaming within Nevada constitute commercial speech protected by the First Amendment.

As to *Central Hudson's* second prong, Defendants assert two substantial interests which are served by a ban on all television and radio advertising of legalized casino gambling: (1) a federalism interest in protecting the policies of states which have not legalized casino gaming; and (2) retarding the growth of private gambling which has been associated with harmful social effects including the spread of or-

ganized crime. *See* Cross-Motion for Summary Judgment (# 24) at 41-48: Reply (# 40) at 7-16.

Several courts, including the Supreme Court, have recognized that within its borders, a state has a substantial interest in regulating the health, safety, and welfare of its citizens; that gambling implicates these concerns; and that the federal government has an interest protecting state choice on this issue. *See Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328, 341, 106 S. Ct. 2968, 2976 (1986); *United States v. Stuebben*, 799 F.2d 225, 228-29 (5th Cir. 1986); *Edge Broadcasting Co. v. United States*, 732 F. Supp. 633, 638-39 (E.D. Va. 1990), *affirmed*, 956 F.2d 263, *cert. granted*, 506 U.S. 1032, 113 S. Ct. 809, 121 L.Ed.2d 683 (1992); *Minnesota Newspaper Ass'n v. Postmaster General*, 677 F. Supp. 1400, 1404 (D. Minn. 1987), *appeal dismissed* 488 U.S. 998, 109 S. Ct. 632, 102 L.Ed.2d 766 (1989); *compare Bigelow v. Virginia*, 421 U.S. 809, 822-25, 95 S. Ct. 2222, 2232-34, 44 L.Ed.2d 600 (1974). As a result, this Court finds that Defendants have a "substantial state interest" in exercising their commerce clause powers in a manner which respects individual state choice with regard to gambling.

This Court, however, rejects Defendants' argument that the desire to curtail the spread of organized crime and the social costs of legalized gambling warrants the ban on advertising of casino gaming at issue in this case. With respect to furthering the spread of organized crime, other than reiterating the well-worn argument that the large sums of cash utilized in casino operations are attractive to criminal elements, Defendants offer no specific evidence to support their assertion that licensed modern day casinos, which are

subjected to heavy regulation, are the serious vehicles of organized crime. *See Zauderer*, 471 U.S. at 647, 105 S. Ct. at 2279, *compare, California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221, 107 S. Ct. 1083, 1094, 94 L.Ed.2d 244 (1987). Furthermore, to the extent casino gaming can be viewed as an attraction to elements of organized crime, Defendants offer no evidence that such elements are any more pervasive in casino gaming than in other forms of gaming for which no advertising limitations are enforced by the FCC.

Similarly, the social costs associated with legalized gambling, while very real, are hardly limited to casino gambling. They are common to all forms of legalized gambling including state lotteries, Indian casinos, horse racing, and charitable gambling. In light of the fact that Congress has allowed interstate advertising of these latter forms of gambling and has generally left the question of whether to permit and regulate gambling to the states, it makes sense that the primary federal interest relating to the social costs of gambling is limited to the protecting individual state choice on this issue. *See* 18 U.S.C. § 1307; 47 C.F.R. § 73.1211(c); *dicta, United States v. Gambling Devices*, 346 U.S. 441, 450-452, 74 S. Ct. 190, 195-196, 98 L.Ed. 179 (1953); *United States v. King*, 834 F.2d 109, 111-113 (6th Cir. 1987), *cert. denied*, 485 U.S. 1022, 108 S.Ct. 1576, 99 L.Ed.2d 891 (1988); *Sterling Suffolk Racecourse Limited Partnership v. Burrillville Racing Association, Inc.*, 802 F. Supp. 662, 668-69 (D.R.I. 1992), *affirmed*, 989 F.2d 1266 (1st Cir. 1993).

The third prong of *Central Hudson* requires Defendants to demonstrate that § 1304 directly advances

its interest in protecting state choice on the issue of casino gambling. Defendants "cannot regulate speech that poses no danger to the asserted state interest." *Central Hudson*, 447 U.S. at 565, 100 S. Ct. at 2350. Furthermore, governmental prohibitions which are speculative and only remotely advance the state interest involved simply cannot justify silencing promotional advertising. *Id.* at 569, 100 S. Ct. at 2353; *Edge Broadcasting Co.*, 732 F. Supp. at 639. After careful consideration of the activity which is banned here and the interests of all those involved, it is clear to this Court that § 1304 as it is currently applied against Plaintiffs fails to satisfy the third prong of *Central Hudson*.

As stated earlier, Defendants' substantial state interest in this case is its federalism concern of protecting state choice on the issue of gambling. It is clear that the states implicated in this case, Nevada, Utah, and California, have divergent perspectives on the social desirability of gambling and casinos.

It is undisputed that the stated public policy of Nevada is strongly aligned with the promotion of legitimate and intensely regulated casino gaming which is free from criminal and corruptive elements. *See* N.R.S. § 463.0129. Utah, by comparison, has clearly demonstrated a public policy against such activity by not allowing any form of legalized gambling within its borders. *See* Supplement to Second Motion for Summary Judgment (# 43), Exhibit 22. Although California's public policy reflects an apparent objection to casino gambling, it allows almost every other form of gambling including a state lottery, horse racing, pari-mutual wagering, Indian gaming where unlimited bingo and slot machines are

permitted, and card rooms. *Id.*; *see also Cabazon Band of Mission Indians*, 480 U.S. at 210-22, 107 S. Ct. at 1088-95; *Syucan Band of Mission Indians v. Roache*, 788 F. Supp. 1498, 1502-03 (S.D. Cal. 1992); *compare Crockford's Club Limited v. Si-Ahmed*, 203 Cal. App.3d 1402, 250 Cal. Rptr. 728, 730 (1988).

Given the fact that the distance traveled by television broadcasts cannot be delineated as precisely as state borders, this Court recognizes that Defendants face a difficult task in reconciling the divergent public policies of California, Nevada, and Utah. Nonetheless, promotional advertising of casino gambling broadcast only from Nevada stations will serve an audience which consists overwhelmingly of Nevada residents within the borders of the State of Nevada, and involves conduct occurring lawfully within the confines of Nevada. Although the evidence before the Court suggests that an extremely small percentage of California and Utah residents may turn on their televisions and see KRNV or KVBC signals, this Court finds it difficult to accept that commercials about legalized casino gambling located in Nevada pose any real danger to the public policies of California and Utah regarding casino gambling. *Compare Edge Broadcasting Co.*, 732 F. Supp. at 639-41.

Recognizing Defendants' duty to attempt to respect the policies of all states regarding gambling, and most importantly, the principles underlying the First Amendment's protection of commercial speech, this Court finds that Defendants' current application of § 1304 and § 73.1211, which effectively imposes a ban on Nevada television stations from broadcasting any promotional advertising relating to casino gambling, only remotely advances its federalism interest. Ac-

cordingly, such a ban fails the third prong of *Central Hudson*, and violates Plaintiffs' First Amendment rights to commercial free speech.

Finally, under the fourth prong of *Central Hudson*, a restriction on commercial speech must be no more extensive than necessary to further the asserted state interest. *Central Hudson*, 447 U.S. at 568-70, 100 S. Ct. at 2352-54. The Court finds that Defendants' present enforcement policy regarding § 1304 and § 73.1211 is not one which is the most narrowly drawn to serve its federalism interests. The deficiency in Defendants' enforcement policy is well illustrated by reference to expressed Congressional policy regarding advertising of state lotteries. In attempting to satisfy the interests of federalism and still respect the public policy views of both lottery and non-lottery states, Congress reached a sensible accommodation by limiting the broadcast of lottery advertisements to television or radio stations located within states which permit such activity. *See* 18 U.S.C. § 1307; 47 C.F.R. 73.1211. This Court fails to see why such a common sense restriction, which is undoubtedly less restrictive than Defendants' complete ban, would not equally apply with respect to casino and non-casino states. In light of this alternative, as well as the fact that broadcasts by KVBC and KRNV at best only incidentally impact the populations of California and Utah, this Court also finds that the categorical ban enforced by Defendants in this case provides "only the most incremental support" for Defendants' federalism interests. Therefore, it does not satisfy the "reasonable fit" required under the fourth prong of *Central Hudson*. *Compare City of Cincinnati v. Discovery Network,*

Inc., et al., 507 U.S. 410, 113 S. Ct. 1505, 123 L.Ed.2d 99 (1993).

D. Equal Protection

Finally, Plaintiffs claim that Defendants' current application of § 1304 and § 73.1211 violates the Equal Protection Clause. Unlike the third and fourth prongs of *Central Hudson*, which require that a regulation directly advance a substantial state interest in a narrowly drawn manner, to satisfy the requirements of the Equal Protection Clause, Defendants need only show a "legitimate state interest" which is not "wholly irrelevant to the achievement of the State's objective." *See Posadas*, 478 U.S. at 344-45 n. 9, 106 S. Ct. at 2978-79 n. 9; *Dunagin v. City of Oxford, Miss.*, 718 F.2d 738, 752-53 (5th Cir. 1983) (*en banc*), *cert. denied*, 467 U.S. 1259, 104 S. Ct. 3553, 82 L.Ed.2d 855 (1984). Given that Defendants have demonstrated a substantial federalism interest and this Court cannot characterize Defendants' ban as "wholly irrelevant," Plaintiffs' Equal Protection claim must be rejected.

IV. Conclusion

In sum, this Court finds that even though § 1304 does apply to Plaintiffs and does not violate the Equal Protection Clause, Defendants' wholesale ban on all broadcasts of promotional advertising of legalized casino gambling by Plaintiffs does not satisfy the requirements of *Central Hudson*. Plaintiffs KVBC and KRNV are, therefore, entitled to the declaratory relief they seek.

ORDER

IT IS THEREFORE ORDERED that Plaintiffs' First Motion for Summary Judgment (# 18) is hereby denied.

IT IS FURTHER ORDERED that Plaintiffs' Second Motion for Summary Judgment (# 23) is hereby granted to the extent described above.

IT IS FURTHER ORDERED that Defendants' Cross-Motion for Summary Judgment (# 24) is hereby denied.